

France: MiFID II rules on inducements transposed into domestic law

Entered into application in January 2018, the revised Markets in Financial Instruments Directive (MiFID II) and its accompanying Regulation (MiFIR) aim, *inter alia*, at enhancing the protection of investors. Among the different provisions that the two instruments articulate to this effect are rules that strengthen the inducements standards introduced under the MiFID I regime. The term “inducement” refers to various types of incentives paid to financial intermediaries in exchange for the promotion of specific products or flows of business. Two texts transpose the new MiFID rules on inducements into French law: the Monetary and Financial Code (*Code monétaire et financier*, CMF) and the General Regulation of the Financial Markets Authority (*Règlement général de l’Autorité des marchés financiers*, RGAMF). The CMF lays down a general and a special regime.

General regime

The general regime draws upon Article L.533-12-4 of the CMF. It applies to inducements that meet two cumulative conditions. First, they need to pertain to investment or ancillary services. Second, they must be received or provided by a third party that does not act on behalf of the client. The CMF enshrines a general prohibition of inducements while articulating two exceptions. The first exception requires the satisfaction of two requirements. A benefit that an investment company may receive or provide must (a) be designed to enhance the quality of the relevant service to the client and (b) not impair the firm’s ability to act honestly, fairly, professionally and in the best interests of its clients. The fulfilment of both requirements is subject to a number of conditions spelled out in Article 314-14 of the RGAMF. With regard to requirement (a), the three following cumulative conditions need to be met. First, the benefit is justified by the provision of an additional or higher-level service to the relevant client, proportional to the level of inducements received, for instance, the provision of non-independent investment advice on and access to a wide range of suitable financial instruments including an appropriate number of instruments from third party product manufacturers having no close links with the service provider. Second, the inducement does not directly benefit the recipient service provider, its shareholders or employees without tangible benefit to the relevant client. Third, it is justified by the provision of an ongoing benefit to the relevant client in relation to an ongoing inducement. As regards requirement (b), the RGAMF specifies that a fee, commission, or non-monetary benefit shall not be considered acceptable if the provision of relevant services to the client is biased or distorted as a result of the fee, commission or non-monetary benefit. The second exception covers benefits which enable or are necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which by their nature cannot give rise to conflicts with the investment firm’s duties to act honestly, fairly and professionally in accordance with the best interests of its clients. In addition, in line with the CMF, the investment firm must disclose to the client, the existence, nature and amount of the inducement. This disclosure must be made in a manner that is comprehensive, accurate and understandable to the client and must be made prior to the provision of the relevant investment or ancillary service. Pursuant to a new disclosure requirement, the investment firm must inform the client, where applicable, on mechanisms for transferring to the client an inducement received in relation to the provision of an investment or ancillary service. As under the previous law, if the amount cannot be ascertained, the investment firm needs only to disclose the method of calculation. However, in such a case, according to Article 314-17 of the RGAMF, after providing the service, it is now required to provide its clients with information of the exact amount of the payment or benefit received or paid.

Special regime under the CMF

Articles L.533-12-2 and L.533-12-3 of the CMF establish the special regime. Stricter than the general regime, the special regime applies to inducements that a) relate to investment advice on an independent basis

or to portfolio management services, and b) are paid or provided by any third party or a person acting on behalf of a third party. For both independent advisers and portfolio managers, the CMF bans the receipt and retention of all monetary and non-monetary benefits from third parties. However, it allows for two exceptions. First, the investment service provider may accept fees, commissions or any monetary benefits from third parties in relation to the above-mentioned services if it transfers them in full to the client. Article 314-18 of the RGAMF contains several specifications in this regard. The transfer of the monetary benefits to the client needs to take place as soon as reasonably possible after receipt. Further, the service provider shall set up and implement a policy to ensure that the benefits at issue be allocated and transferred to each individual client. Finally, the service provider must inform clients about the fees, commissions or any monetary benefits transferred to it, such as through the periodic reporting statements provided to the client. Second, minor non-monetary benefits are exempted from the prohibition if they are capable of enhancing the quality of service provided to a client and, having regard to the total level of benefits provided by one entity or group of entities, are of a scale and nature that are unlikely to impair compliance with an investment firm's duty to act in the best interest of the client. Article 312-20 of the RGAMF enumerates in an exhaustive manner benefits that qualify as acceptable minor non-monetary benefits. These include information or documentation relating to a financial instrument or an investment service, which is generic in nature or personalised to reflect the circumstances of an individual client; written material from a third party that is commissioned and paid for by a corporate issuer or potential issuer to promote a new issuance by the company, where the third party firm is contractually engaged and paid by the issuer to produce such material on an ongoing basis; provided that the material: a) clearly discloses the relationship between the issuer and the third party; and b) is made available at the same time to any investment services provider wishing to receive it or to the general public; participation in conferences, seminars and other training or information events on the benefits and features of a specific financial instrument or an investment service; and hospitality of a reasonable de minimis value, such as food and drink during a business meeting or a conference, seminar or other training or information events. While such non-monetary benefits may be received or provided without having to be transferred to the client, they nevertheless are subject to disclosure. Julien Dif, Luxembourg